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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1975
No. 74-1656

JOHN C. MOE, et al., Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al., Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al., Appellants,

v.

JOHN C. MOE, et al., Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE QUINAULT INDIAN NATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

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I.

INTEREST OF QUINAULT INDIAN NATION AS AMICUS CURIAE

Appellants and Appellees have consented to the filing of this brief. Written stipulations of consent have been filed with the Clerk of this Court.

The Quinault Indian Nation is a federally recognized Indian tribe of some 1,500 enrolled members, a majority of whom reside on the Quinault Indian Reservation in the State of Washington. The Business Committee of the Quinault Indian Nation is the governing body of the Nation and the Quinault Reservation pursuant to the Treaty with the Quinault, 12 Stat. 971, and the Bylaws and Constitution of the Quinault Indian Nation adopted in 1922, as Amended March 22, 1975.

The Quinault Indian Nation provides judicial, police, fire, ambulance, sanitation, utility, health, safety, zoning,

housing, fish and game management, forestry management, and other services to the population of the Reservation - Indian and non-Indian. Many of these services cannot be provided by county or state agencies because of lack of funds and manpower to provide such services. The Quinault Nation also provides social, medical, and legal aid services to its own members.

In order to provide these services the Quinault Nation must levy and collect taxes and other fees from members and non-members acting upon the Reservation. For example fisheries management, biological, and enforcement services are funded through the collection of taxes levied upon Indians and non-Indians who participate in the commercial and sport harvest of the abundant fish resources of the Reservation. The overwhelming

majority of this fish is sold to non-Indians. If the State of Washington is permitted to levy a tax on these sales, the Quinault Nation would be forced to do away with its own taxes. The small incomes of its members would not support a system of double taxation.

These tribal taxes are also important in bringing federal revenue sharing funds and grants and loans from the federal Law Enforcement Administration, Economic Development Agency, Department of Housing and Urban Development, and Department of Health, Education and Welfare, to the Reservation. Unlike tribal taxes, State taxes which have been levied for a half century on much of the timber removed from the Quinault Reservation; do not in substantial part return to the economy of the Reservation. Thus, the very existence of tribal governmental

functions on the Quinault Reservation is threatened by the taxing authority which the State of Montana and Amicus State of Washington seek throught this litigation.

Further, the economy of the Quinault Indian people is threatened by the scheme of state taxation within the boundaries of the Reservation sought by Montana and approved in part by the Court below. The organization and existence of tribal and individual Indian enterprise on the Reservation is affected by the imposition of state tax laws. The burden of accounting and bookkeeping expenses necessary for the collection of such taxes falls directly on the Indian business.

It is incorrect to argue that Indian enterprises operating on a reservation may limit their sales to Indians. (See Opinion of Court below. 392 F. Supp., at 1308) The result of

such a limitation on the Quinault Reservation and most others, would be the destruction of Indian enterprise and a violation of the federal policy calculated to make all Indians full-fledged participants in American society. Williams v. Lee, 358 U.S. 217, at 220. While only a quarter of the population of the Reservation is non-Indian, most of the goods produced or sold on the Reservation are sold to non-Indians. The Reservation population of just over 1,000 Indian persons is too small and economically depressed a market to provide for significant Indian to Indian sales. The fish packing plant, individual and tribal cedar roofing mills, and arts and crafts shops could not survive such a limitation.

Assuming they did survive the imposition of state taxes, their goals and structure would have to be substantially

changed. The tribal business enterprises are organized not to maximize income to the tribe, but to utilize the human and material resources of the Reservation for the benefit of the Indian people. Thus, there is less emphasis placed on the ability of the enterprise to earn large surpluses and greater emphasis placed on employment, training, and advancement of tribal members; the wise use of the material resources of the Reservation; respect for the cultural values of Indian employees; and keeping wealth generated by the enterprises within the Reservation economy. The realization of these goals is partially dependent on the fact that tribal enterprises are totally within the tribal jurisdiction and they and their customers do not bear the costs of being taxed or regulated by agencies of the State.

It is questionable whether the Indian enterprises of the Quinault Nation could continue to play these beneficial roles within the tribal community were they or their customers taxed by the State. It is also questionable whether they could succeed at all on the Reservation. Tribal enterprises organized along the lines of non-Indian businesses have generally been unable to compete with non-Indian businesses.

In sum, it is the position of the Quinault Nation that the scheme of taxation sought by the states in this litigation will have a great detrimental effect upon the Quinault Indian people, economy and government. If approved, this tax scheme will deprive the tribal government of needed revenue, and the tribal enterprise management committees of their flexibility to design tribal enterprises

to meet Indian needs. In these major respects this tax scheme infringes on the right of reservation Indian people to govern themselves.

ARGUMENT

I.

INVOLVEMENT OF INDIANS WITH NON-INDIANS IS NOT A BASIS UPON WHICH A STATE MAY RELY TO ASSERT JURISDICTION OVER INDIANS ACTING WITHIN THE BOUNDARIES OF AN ESTABLISHED INDIAN RESERVATION

In concluding that Montana may require an Indian retailer to collect Montana taxes from non-Indians for purchases made on the reservation, the Court below argues only that it is the involvement of the Indian retailer with non-Indians that gives Montana the authority to compel collection. The Court below does not cite one instance where this concept of reservation Indian involvement with non-Indians on the reservation

has ever been the criterion for a judicial or congressional grant of jurisdiction over an Indian to the states. 392 F. Supp., at 1311.

The question to be answered in this litigation has little to do with the tax power of states. The issue is whether a state has the requisite jurisdiction within the boundaries of an established Indian reservation to force an Indian to act in compliance with its laws. The State of Montana seeks to compel, by civil and criminal punishment, a reservation Indian to do the act of collecting its taxes. It will be assumed, although not conceeded, that a state may require its non-Indian citizens to pay state taxes on goods purchased on Indian lands within the boundaries of an established Indian reservation. This state interest in revenue does not, however, extend to

the right to compel the retail merchants of a foreign state or jurisdiction to collect taxes from the resident citizens of the state. The question is one of state jurisdiction to force the act of collection, rather than one of taxing power.

The fallacy in the analysis of the Court below may be more readily seen if an example having nothing to do with taxation is used. Suppose a state has no public health jurisdiction[1] over Indians within the boundaries of an established Indian reservation. The state adopts a public health statute which makes the act of smoking while inside a restaurant a misdemeanor. The statute conclusively presumes that it is enacted for the protection of the health of restaurant

1) 25 U.S.C. §231, §1321, and §1322 have not been complied with in the public health area.

patrons. The statute also subjects restaurant proprietors to a misdemeanor penalty and to closure of the restaurant if they do not take certain steps to inform patrons of the no smoking law and actively prevent patrons from smoking while inside the restaurant by denial of service and eviction.

Assume that an Indian restaurant owner of a reservation within this state establishes a restaurant on tribal land within the boundaries of that reservation, but in an area where the restaurant is frequented by a large number of non-Indians. The tribe has no statute prohibiting smoking in restaurants. May the state by the use of its public health law and its interest in protecting the health of its non-Indian citizens force the Indian proprietor, by the threat of closure and criminal charges;

to take action against persons who smoke in his restaurant? The question, of course, is a matter of jurisdiction. While the state may have a legitimate interest in the protection of the health of its citizens, its right to implement that interest is limited by its jurisdiction.

How close does the involvement of Indian with non-Indian on the reservation as described by the Court below have to be before state jurisdiction arises. A sale, a marriage, a partnership, a written correspondence, a contract, a telephone conversation, a purchase? Would residence within an area where the majority of neighbors are non-Indians suffice for certain purposes?

It is the belief of the Quinault Nation that this Court spoke directly to this issue in McClanahan v. Arizona

State Tax Commission, 411 U.S. 164, (1973), when it declared that the admitted absence of state jurisdiction over the Indian people of the Navajo reservation would seem to dispose of the issues in McClanahan. 411 U.S., at 179. Because the Court below relied on the theory of Indian involvement with non-Indians as a basis for state jurisdiction it is given some consideration below.

In the area of criminal jurisdiction the activies of Indians either as perpetrators of crimes against non-Indians within the boundaries of reservations are subject to tribal and federal jurisdiction only, absent a governing act of Congress. The non-Indian perpetrator of a crime against an Indian or Indian property within a reservation subjects himself to federal jurisdiction. 18 U.S.C. §1151, §1152, §1153, §1154, §1155, §1156, §1160,

§1163, §1164, §1165.

Civil jurisdiction over Indians involved in commercial dealings with non-Indians within the reservation has been held to be in the tribe where the state has not complied with a governing act of Congress. Kennerly v. District Court of Montana, 400 U.S. 423 (1970), at 426. Here the Court below indicates that in terms of civil jurisdiction, the same governing act of Congress which prevented the State of Montana from exercising civil jurisdiction over an Indian in Kennerly, P.L. 83-280, 67 Stat. 589, 28 U.S.C. 1360 (a), has not been complied with. 392 F. Supp., at 1306. The Moe court finds the Montana revenue collection statutes are civil in nature. It is difficult to understand how that Court distinguishes its holding from the holding of Kennerly.

II.

MESCALERO AND MCCLANAHAN PROVIDE A BASIS FOR THE DETERMINATION OF JURISDICTIONAL ISSUES ON INDIAN RESERVATIONS

The brief of the Attorney General of the State of Washington attempts to contrast Mescalero Apache Tribe v. Jones 411 U.S. 145 (1973) with McClanahan and argues that they cannot be reconciled because Mescalero holds that in order to obtain "immunity" from state taxation an Indian person or tribe must point to a specific exemption and McClanahan holds that in order for a state to tax an Indian or Indian income the state must show some expres federal legislation giving it the jurisdiction to levy and collect such a tax.

In fact the two holdings are easily reconciled. Mescalero announces the rule when the Indian, his income, or his property is located outside the

reservation, and McClanahan announces the rule when the Indian, his income, or his property is located within the boundaries of an established Indian reservation. The Mescalero court says just exactly that. 411 U.S., at 148.

Thus, in both Mescalero and McClanahan the questions of whether taxes can be collected were considered by this Court in terms of jurisdiction. In Mescalero this Court was careful to point out, 411 U.S. at 148-149, that tribal activities carried on outside the reservation boundaries are generally subject to the nondiscriminatory laws of the state. Such activities are subject to state jurisdiction. In Mescalero the Court went on to find, consistently, that for some of the activities carried on by the Mescalero Apache Tribe no specific immunity from state taxes existed, and

for some activities federal statutes prohibited taxation.

In McClanahan this Court pointed out...

> "Indeed a startling aspect of this case is that appellee (state) apparently conceeds that in the absence of compliance with 25 U.S.C. 1322(á) the Arizona Courts can exercise neither civil or criminal jurisdiction over reservation Indians... But the appellee nowhere explains how, without such jurisdiction, the State's tax may be either imposed or collected... Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, cf. Ward v. Board of County Commissioners, 253 U.S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case." 411 U.S., at 178.

Thus, a conceptual framework for the determination of state power is established in terms of jurisdiction. Outside the reservation, where the state generally exercises jurisdiction, the state will be presumed to have taxing authority-absent

a federal prohibition. Within the reservation boundaries, where the Tribal and Federal governments generally exercise jurisdiction, the state may not tax or compel any other acts by Indians without clear authorization.

The Amicus State of Washington argues that states do exercise jurisdiction within the reservations. The cases cited for this proposition, however, are all readily distinguishable from the issue at hand. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); Langford v. Monteith, 102 U.S. 145 (1880); were all cases which involved actions against a non-Indian by another non-Indian. In these cases this Court found that no federal[2] interest was

2) This Court has never decided, however, whether tribal jurisdiction might be asserted when the actions of a non-Indian against another non-Indian threaten the peace and safety of the reservation community.

involved and permitted state court to exercise jurisdiction. New York ex rel. Ray v. Martin, 326 U.S. 496 (1946) simply followed the rule in McBratney, supra; and there was a question, admittedly unanswered, as to whether the Seneca Reservation was a state or federal reservation. Kake v. Egan, 369 U.S. 60 (1962); Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); and United States v. McGowan, 302 U.S. 535 (1938) were all cases in which no established Indian reservation was involved. In McGowan federal jurisdiction attached even though a crime was committed by a white man outside an established Indian reservation because of a federal interest in the charge of selling intoxicants to Indians. This Court in Williams v. Lee, 358 U.S. 217 (1958) found, consistent with the above analysis, that a state court action to collect a debt could not be

brought against an Indian by a white Indian trader located within a reservation because no federal statute had given the state any jurisdiction over such controversies. 358 U.S., at 222.

Finally, the residual jurisdiction argument at the State of Washington has been rejected by this Court in McClanahan. 411 U.S., at 177. By considering questions regarding the right of a state to compel or affect Indians acting within the boundaries of established reservations in terms of jurisdiction, this Court has done away with the concept Indian "immunity". The Indian acting within the boundaries of an established reservation is not seen as "immune" from state jurisdiction, but simply subject to another jurisdiction - that of the tribe or the federal government.[3]

3) For a discussion of the "Equal (cont.)

The Congress of the United States has recently declared again its strong support for the exercise of tribal jurisdiction within the reservation. The preamble of the Indian Self Determination and Education Act P.L. 93-638, 13 U.S.C. and A.N. 1974, p. 7223, January 30, 1975; (See also: 25 U.S.C. §1451) indicates that Congress is intent upon turning over the great majority of federal functions to the tribal governments themselves. To allow the states to force reservation Indians to comply with state laws simply because the Indian continues to have business or other kinds of relationships with non-Indians would surely undermine this policy.

For these reasons the Quinault

Footing Doctrine" as raised by the State of Washington, see: Taylor, Development of Tripartite Jurisdiction in Indian Country, 22 Kansas Law Revies 351 (1974).

Indian Nation respectfully urges this Court to uphold the position of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Dated the 20th day of December, 1975

Respectfully submitted,
Michael Taylor
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CERTIFICATE OF MAILING

I, MICHAEL TAYLOR, the attorney for Amicus Curiae Quinault Indian Nation certify that on the 19 day of December, 1975, I served three copies of the foregoing BRIEF FOR THE QUINAULT INDIAN NATION on each of the counsel for Appellants and Appellees herein by mailing true copies thereof, first class airmail postage prepaid as follows:

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